COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2174 **Cir. Ct. No. 2011CV1408**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FRANKLIN G. SCHAEFER, ARDIS J. SCHAEFER, DEBRA SCHAEFER AND SHERI SCHAEFER,

PLAINTIFFS-RESPONDENTS,

V.

MIROSLAV RISTIC AND MIRA RISTIC,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Franklin Schaefer, his wife, Ardis, and their daughters brought this action to quiet title via adverse possession to a disputed

strip of land between their property and that owned by Miroslav and Mira Ristic. The Ristics appeal the judgment holding that the Schaefers own the property through adverse possession and which ordered the Ristics to pay damages for vegetation they removed from the strip while litigation was pending. We affirm.

¶2 The facts are taken from affidavits and trial testimony. The west border of the Schaefers' property abuts the east border of the Ristics'. The Schaefers[1] bought their parcel in 1951. Access to an old dwelling on the southwest corner of the Schaefer property was by a dirt driveway from a road on the south. A wire-and-wood-post fence, built in the 1930s, separated the southern half of the Schaefer property from that of the Langs, the Ristics' predecessors. The Schaefers completed the wire fence up to the north boundary and periodically placed along it rocks that surfaced. The Schaefers consistently cultivated and maintained the land up to the fence line and pastured their livestock on it. Even after the old dwelling was torn down, the driveway remained. When the Schaefers built a new house, they extended the driveway without altering the original portion.

¶3 The Langs and Schaefers both treated the fence as the boundary line. A Lang daughter testified that she lived on what now is the Ristics' property from 1951 to 1972; that she remembered a barbed-wire fence running the length of the property, north to south; that, as children, she and her brother were told to stay on their own property, which meant on their side of the fence; and that the only way

[1] Franklin, his brother, Richard, and their father purchased the land. The father died in 1969. In 1992, Franklin and Ardis bought out Richard's interest in the half of the property that borders the Ristics'. In 2008, Franklin and Ardis transferred their interest to their daughters and retained a life estate for themselves.

to get from one side to the other was to climb over or through the fence. A Schaefer daughter testified that she helped plant crops up to the fence line and that her dad replaced rotted wooden fence posts with metal stakes, so the fence line eventually was a mix of posts, rocks, and "volunteer" trees and shrubs that grew up. Both testified that the driveway remains in the same location as the original.

¶4 Surveys recorded in 1981 and 1995 showed that part of the original driveway and differing portions of the boundary fence were west of the recorded property line.[2] The Ristics bought their property in 1999. Miroslav testified that, before purchasing the property, he had seen a copy of the 1995 survey and was aware of the driveway encroachment. The Ristics' attempted sale of their property in 2005 fell through when their broker discovered and disclosed the driveway encroachment. Through the broker, the Ristics advised the Schaefers of the encroachment. The Schaefers continued to use the driveway.

¶5 The Schaefers filed this adverse possession action in 2011. After being served, the Ristics cut down numerous trees and shrubs on the disputed parcel, many of which the Schaefers had planted. The trial court enjoined them from removing any more vegetation while the litigation was pending.

¶6 The Schaefers stipulated at trial that no part of their claim was based on acts occurring after 1999. After a three-day bench trial, the court ruled that the Schaefers adversely possessed the disputed property. It awarded them $6,990 in

[2] A survey the Schaefers commissioned in 2010, while not identical in result to the prior two, also showed encroachment. A resurvey in 2012 showed that the entire boundary fence sat west of the property line.

damages for the removal of trees and shrubs, rejecting their request for nearly $20,000 as unsupported by the evidence. The Ristics seek review.

¶7 We question why this appeal was brought at all. The Ristics approached this as an adverse-possession case from the outset, yet now assert that the trial court "ruled on the wrong issue." They posit that the proper analysis is under WIS. STAT. §§ 706.08 and 706.09 (2011-12).[3] Considerations of fairness and judicial economy militate against this court telling the trial court that it erred in not addressing issues never presented to it. *See* ***State v. Caban***, 210 Wis. 2d 597, 605, 563 N.W.2d 501 (1997). Beyond that, those statutes deal with conveyances, not title to land acquired through operation of law. *See* WIS. STAT. § 706.001(2)(a).

¶8 Adverse possession not founded on a written instrument requires proof of twenty years of uninterrupted possession of the disputed property to the extent the property is actually occupied and either protected by a substantial enclosure or usually cultivated or improved. WIS. STAT. § 893.25(2). A person claiming adverse possession must prove that the use was hostile, open, notorious, exclusive, and continuous. ***Keller v. Morfeld***, 222 Wis. 2d 413, 416-17, 588 N.W.2d 79 (Ct. App. 1998). The ordinary use of land, such as the owner would use it in the normal course of events, can provide sufficient notice of exclusive possession. ***Burkhardt v. Smith***, 17 Wis. 2d 132, 138, 115 N.W.2d 540 (1962).

[3] The Schaefers complain that the Ristics raised WIS. STAT. § 706.09(1)(b) for the first time in their reply brief and move to strike that portion of the reply brief. As the Ristics' § 706.09 argument is to no avail anyway, we deny the motion.

All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

¶9 The finder of fact must strictly construe the evidence against the adverse possessor and apply all reasonable presumptions in favor of the true owner. ***Pierz v. Gorski***, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979). The findings of fact will be upheld unless they are clearly erroneous. ***Steuck Living Trust v. Easley***, 2010 WI App 74, ¶11, 325 Wis. 2d 455, 785 N.W.2d 631. Whether those facts meet the legal standard for adverse possession is reviewed de novo. ***Id.***

¶10 The trial court found that the driveway was in its current location since 1967, the year an aerial photograph was taken, because there was "absolutely no evidence" of any alteration to the driveway since then, and that the Schaefers openly, notoriously, hostilely, and continuously used and controlled the land the driveway occupies since that time, such that title in it vested in the Schaefers in 1987. We agree. As to the fence, the Ristics contend that the remnant fence was in such disrepair as to not be a "substantial enclosure." To be substantial, however, an enclosure need not be in any particular state of repair or capable of "exclu[ding] outside interferences." ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 446, 85 N.W. 402 (1901). The court heard testimony from witnesses with first-hand knowledge that the Schaefers pastured livestock in the field, cultivated the land, and kept up the fence that both they and the Langs respected as the property line. The fence was a substantial enclosure for the requisite length of time.

¶11 The Ristics argued to the trial court that, even if the Schaefers made a colorable adverse-possession claim, it was extinguished by their failure to record the claim under the thirty-year recording requirement of WIS. STAT. § 893.33(2). That recording requirement does not apply here. Section 893.33(5), the "owner-in-possession" exception, draws a distinction between an owner in possession, here, the Schaefers by operation of law, and a title holder. *See* ***O'Neill v. Reemer***,

2003 WI 13, ¶30, 259 Wis. 2d 544, 657 N.W.2d 403. By its plain language, § 893.33 "does not apply to any action … by any person who is in possession of the real estate involved as owner at the time the action is commenced." Sec. § 893.33(5). What's more, as the Ristics do not renew that argument here, except in the context of the inapt WIS. STAT. § 706.09(1)(k), we need not address it further. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

¶12 The trial court's findings are not clearly erroneous and the inferences it drew were reasonable. This court thus must accept them. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). Based on those facts, we agree with the trial court that title to the disputed land vested in the Schaefers through adverse possession.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.